Tuan Syed Hashim bin Tuan Long v Esso Production Malaysia Inc

HIGH COURT (KUALA LUMPUR) — ORIGINATING MOTION NO R1-25-121 OF 1995
ABDUL KADIR SULAIMAN J
22 DECEMBER 1997

Civil Procedure *— Certiorari — Application for order of — Whether application for order of certiorari was irregular as being contrary to the requirement of O 53 r 2(1) of the Rules of the High Court 1980 — Whether application must be made by way of an originating motion in Form 9 in Appendix A — Whether application by way of notice of motion which does not state the grounds of the application and was not accompanied by a supporting affidavit was irregular — Rules of the High Court 1980 O 53, Forms 9 & 10*

Labour Law *— Employment — Redundancy — Reorganization of the affairs of the employer company — Prerogative of the employer to reorganize to achieve maximum efficiency and effectiveness and to avoid duplicity of work provided it is done bona fide — Whether termination of service by the employer was without just cause or excuse*

The applicant was employed as an administrative manager of the respondent at Terengganu. The respondent informed the applicant that his post as an administrative manager had been eliminated due to redundancy and for better efficiency. As a result, he was offered the job of safety specialist in Kuala Lumpur. The applicant declined the offer. As the offer was rejected, the respondent issued him with a termination notice where he was also offered a retirement benefit of RM400,000. The issue was whether on account of the reorganization of the affairs of the respondent company, there was indeed a redundancy in the post of administrative manager held by the applicant, and whether there was mala fide in the respondent in the carrying out of the reorganization exercise resulting in the post of administrative manager being made redundant. The Industrial Court held that the termination of service of the applicant on grounds of redundancy was valid. The applicant appealed to the High Court by filing a notice of motion for the grant of an order of certiorari, stating the grounds for the application along with an affidavit sworn by the applicant as required by O 53 of the Rules of the High Court 1980 ('the RHC'). The notice of motion was later converted into an application for leave to apply for an order of certiorari. Subsequently, upon leave being granted, on 6 February 1997, the applicant applied for an order of certiorari to quash the award of the Industrial Court. The respondent contended, inter alia, that the application of the applicant was irregular as being contrary to the requirement of O 53 r 2(1) of the RHC which requires that such an application must be made by way of an originating motion which according to him should be in Form 9 in Appendix A to the RHC. Furthermore, the notice of motion of the applicant of 6 February 1997 for the substantive application does not state the grounds of the application and was not accompanied by a supporting affidavit.

Held, dismissing the application:

(1) There was no substance in the allegations made by the applicant that his dismissal by the respondent was without just cause or excuse. The right to reorganize the company is the prerogative of the management to achieve maximum efficiency and effectiveness and to avoid any kind of duplicity of work in the company. This prerogative belongs to the company provided it is done bona fide. If in the process of doing that, some workmen had to be laid off, there are ample provisions in the law to provide them with retrenchment benefits. In this case, the applicant was to be paid retrenchment benefits for that purpose when he refused the offer by the respondent to re-deploy him in another post as a specialist assistant. This offer was properly made by the company arising out of the reorganization. The company after all was not obliged to make any offer for any alternative employment on account of the exercise properly carried out. Further, it was not mala fide on the part of the respondent not to consult or discuss with the applicant its determination to re-organize its company (see pp 542F–G and 543A–C, G).

(2) The notice of motion of the applicant was not in Form 9 but was in the substance of Form 10 of Appendix A. The heading of Form 9 is 'Notice of Originating Motion' and the heading of Form 10 is 'Notice of Motion'. Both of them are in respect of an application by motion. However, in the light of the requirement of O 53 r 1 for leave to be first obtained before any application for an order of certiorari can be made, it is not outside the purview of the requirement of O 53 r 2 if in the application for an order of certiorari after leave has been granted, Form 10 is used even though the heading in Form 10 omitted the use of the word 'originating' because the notice is given pursuant to the leave having been granted. As to the failure to include the grounds and the affidavit verifying the facts relied on in the Form 10 notice of motion, it was not at all irregular because Form 10 itself does not require the inclusion of them and O 53 r 2(3) itself merely requires that the notice of motion be served on all persons directly affected and O 53 r 3(1) requires that copies of the statement and of the affidavits in support of the application for leave to apply for an order of certiorari be served with the notice of motion under r 2. In the circumstances, there was no merit at all in the complaint raised by learned counsel for the respondent. There was thus no irregularity in the procedure in this case (see p 540E–I).

[Bahasa Malaysia summary

Pemohon digaji sebagai seorang pengurus pentadbiran untuk pihak penentang di Terengganu. Penentang telah memberitahu pemohon bahawa jawatannya sebagai seorang pengurus pentadbiran telah disingkirkan disebabkan lebihan pekerja dan untuk kecekapan yang

A lebih tinggi. Akibatnya, dia telah ditawarkan jawatan pembantu pakar keselamatan di Kuala Lumpur. Pemohon menolak tawaran itu. Oleh kerana tawaran ditolak, penentang mengeluarkan notis pemberhentian kepadanya di mana dia juga telah ditawarkan faedah persaraan sebanyak RM400,000. Isu adalah sama ada dengan mengambil kira penyusunan semula hal ehwal syarikat penentang, memang terdapat B lebihan pekerja dalam jawatan pengurus pentadbiran yang dipegang oleh pemohon, dan sama ada terdapat mala fide dalam penentang dalam menjalankan latihan penyusunan semula yang menyebabkan jawatan pengurus pentadbiran menjadi tidak diperlukan. Mahkamah Perusahaan memutuskan pemberhentian perkhidmatan pemohon atas C alasan lebihan pekerja adalah sah. Pemohon merayu kepada Mahkamah Tinggi dengan memfailkan notis usul untuk pemberian perintah certiorari, menyatakan alasan untuk permohonan bersama dengan satu afidavit yang diikrarkan oleh pemohon seperti dikehendaki oleh A 53 Kaedah-Kaedah Mahkamah Tinggi 1980 ('KMT'). Notis usul kemudiannya ditukar menjadi permohonan untuk kebenaran D memohon perintah certiorari. Berikutnya, setelah kebenaran diberikan, pada 6 Februari 1997, pemohon memohon satu perintah certiorari bagi membatalkan award Mahkamah Perusahaan. Penentang berhujah, antara lain, bahawa permohonan pemohon adalah luar aturan kerana melanggar keperluan A 53 k 2(1) KMT yang E menghendaki bahawa permohonan demikian dibuat melalui usul pemula yang menurutnya haruslah dalam Borang 9 Lampiran A kepada KMT. Tambahan pula, notis usul pemohon bertarikh 6 Februari 1997 untuk permohonan substantif tidak menyatakan alasan permohonan dan tidak diiringi oleh afidavit menyokong.

F **Diputuskan**, menolak permohonan:

(1) Tiada kebenaran dalam pengataan yang dibuat oleh pemohon bahawa pemecatannya oleh penentang adalah tanpa sebab atau alasan yang munasabah. Hak menyusun semula syarikat adalah prerogatif pihak pengurusan bagi mencapai kecekapan dan keberkesanan G maksima dan untuk mengelak sebarang jenis kependuaan kerja dalam syarikat. Syarikat mempunyai prerogatif ini dengan syarat ia dilakukan secara bona fide. Seandainya dalam proses melakukannya, beberapa pekerja terpaksa diberhentikan, terdapat peruntukan undang-undang yang lebih daripada mencukupi yang menyediakan faedah pengurangan pekerja. Dalam kes ini, H pemohon dibayar faedah pengurangan pekerja untuk tujuan itu apabila dia menolak tawaran penentang untuk menugasinya semula dalam jawatan lain sebagai pembantu pakar keselamatan. Tawaran ini telah dibuat dengan wajarnya oleh syarikat yang timbul daripada penyusunan semula. Lagipun syarikat tidak wajib I membuat apa-apa tawaran untuk penggajian alternatif memandangkan latihan dijalankan dengan betul. Seterusnya, tidaklah mala fide pada pihak penentang untuk tidak merunding atau membincang dengan pemohon tentang azamnya untuk menyusun semula syarikat (lihat ms 542F–G dan 543A–C, G).

(2) Notis usul pemohon tidaklah dalam Borang 9 tetapi pada amya dalam Borang 10 Lampiran A. Tajuk Borang 9 adalah 'Notis Usul Pemula' dan tajuk Borang 10 adalah 'Notis Usul'. Kedua-duanya adalah berkenaan dengan permohonan melalui usul. Namun demikian, memandangkan keperluan A 53 k 1 untuk kebenaran diperolehi dahulu sebelum apa-apa permohonan untuk perintah certiorari boleh dibuat, ia tidak di luar skop keperluan A 53 k 2 sekiranya dalam permohonan untuk perintah certiorari selepas kebenaran telah diberikan, Borang 10 digunakan sungguhpun tajuk dalam Borang 10 tertinggal penggunaan perkataan 'pemula' kerana notis diberikan menurut kebenaran yang diberikan. Mengenai kegagalan untuk memasukkan alasan dan afidavit yang menentusahkan fakta-fakta yang terkandung dalam notis usul Borang 10, ia tidak luar aturan sama sekali kerana Borang 10 sendiri tidak menghendaki pemasukan mereka dan A 53 k 2(3) sendiri cuma menghendaki bahawa notis usul disampaikan kepada semua orang yang terjejas secara langsung dan A 53 k 3(1) menghendaki bahawa salinan pernyataan dan afidavit menyokong permohonan untuk kebenaran memohon perintah certiorari disampaikan dengan notis usul di bawah k 2. Dalam keadaan demikian, tiada merit langsung dalam aduan yang dibangkitkan oleh peguam bijaksana pihak penentang. Justeru itu tiada luar aturan dalam prosedur dalam kes ini (lihat ms 540E–I).]

Notes

For a case on certiorari, see 2 *Mallal's Digest* (4th Ed, 1994 Reissue) para 762.

For cases on employment, see 8 *Mallal's Digest* (4th Ed, 1996 Reissue) paras 595–914.

Cases referred to

Goon Kwee Phoy v J & P Coats (M) Sdn Bhd [1981] 2 MLJ 129 (refd)

Wong Chee Hong v Cathay Organisation (M) Sdn Bhd [1988] 1 MLJ 92 (refd)

Legislation referred to

Industrial Relations Act 1967 s 20

Rules of the High Court 1980 O 53 rr 1, 1(2), 2(1), (3), 3(1), Form 9, Form 10 Appendix A

Rose Zilawati bte Arifin (*Chua Brothers Azzat & Izzat*) for the applicant.
Jacqueline Ann Christie and *Andrew Tsan Chuan Saw* (*Ng Yook Woon Andrew TC Saw & Co*) for the respondent.

Cur Adv Vult

Abdul Kadir Sulaiman J: On 21 July 1995, the applicant filed a notice of motion, purportedly pursuant to leave granted for an order of certiorari

A to quash and/or set aside Award No 258 of 1995 handed down by the Industrial Court on 20 June 1995 whereby it was held that the termination of the service of the applicant by the respondent was valid and that the claim of the applicant was without merit. In that notice of motion, it is stated that the grounds for the application are as stated in the affidavit of Tuan Syed Hashim bin Tuan Long and in the statement under O 53 r 1(2) B of the Rules of the High Court 1980 ('the RHC'). Attached to the said notice of motion is the affidavit of Syed Hashim bin Tuan Long affirmed on 21 July 1995 and a statement filed in accordance with O 53 r 1(2) of the RHC.

Then by a summons in chambers filed on 11 October 1995, the C applicant applied for leave to amend the said notice of motion of 21 July 1995. On 11 December 1995, leave was granted to the applicant thereby converting the notice of motion into an application for leave to apply for an order of certiorari instead. On 5 February 1997, on the hearing of the amended motion, leave to apply for an order of certiorari was granted. D Pursuant to the leave granted, the applicant on 6 February 1997 filed another notice of motion for the substantive application for an order of certiorari to quash and/or set aside the said award of the Industrial Court handed down on 20 June 1995. On 15 July 1997, the said substantive application came up for hearing. However, on that day the parties agreed to proceed by way of written submissions and the hearing was adjourned E to 29 October 1997.

Learned counsel for the respondent contends in his written submissions that this application of the applicant is irregular as being contrary to the requirement of O 53 r 2(1) of the RHC which requires that such an application must be made by way of an originating motion which F according to him should be in Form 9 in Appendix A to the RHC. Furthermore, the notice of motion of the applicant of 6 February 1997 for the substantive application does not state the grounds of the application and was not accompanied by a supporting affidavit. In her submission in reply, Rose Zilawati, counsel for the applicant maintained that the applicant had adopted the right procedure in the making of this application.

G In this case, on 5 February 1997 the amended notice of motion for leave to apply for an order of certiorari came up for disposal. Under normal circumstances, this nature of application must be made ex parte pursuant to O 53 r 1(2). But on that day, counsel representing the respondent was present for the hearing and at the request of both counsel, H the application was heard inter partes. Both counsel made their submissions upon the application for leave. Having heard the arguments, I found that the application was not frivolous or vexatious to entitle me to refuse the leave sought. By an oral decision, I granted the leave sought by the applicant to apply for the order of certiorari to quash the decision of the Industrial Court. Pursuant to that leave granted, the applicant filed the I notice of motion on 6 February 1997. It is to this notice of motion that learned counsel for the respondent objected. The said notice of motion is in encl (24). It merely prays for an order of certiorari to quash and/or to set aside the award handed down by the Industrial Court on 20 June 1995

whereby the court ordered that the termination by the respondent was valid and the claim of the applicant had no merit. The applicant also prays for this court to refer back to the hearing of the application in the amended notice of motion dated 11 October 1995 together with the affidavit of Syed Hashim bin Tuan Long together with the statement filed pursuant to O 53 r (1)(2) of the RHC and also the further affidavit of Balbinder Kaur affirmed on 31 January 1997, and for costs and any other order deemed fit. The affidavit of Syed Hashim bin Tuan Long was the affidavit of the applicant filed in support of the pre-amended notice of motion and the further affidavit of Balbinder Kaur is in encl (21) exhibiting the copy of the notes of evidence of the Industrial Court for the purpose of the hearing of the application for leave to apply for an order of certiorari based on the amended notice of motion scheduled for hearing on 5 February 1997.

The issue, therefore, is whether the application of the applicant for the order of certiorari is regularly made pursuant to the requirement of O 53 of the RHC. Order 53 r 2(1) thereof states:

> *When leave has been granted* to apply for an order of ... certiorari, the application for such an order must be made by *originating motion* to a Court, ..., and, unless the Court ... granting leave has otherwise directed, there must be at least 8 clear days between the service of the notice of motion ... and the day named therein for the hearing. (Emphasis added.)

The respondent says that the application for an order of certiorari being required to be made by originating motion must be in Form 9 and since it is not so done, the application is irregular. Looking at the notice of motion of the applicant as in encl (24), it is correct to say that it is not in Form 9 but it is in the substance of Form 10 of Appendix A. The heading of Form 9 is 'Notice of Originating Motion' and the heading of Form 10 is 'Notice of Motion'. Both of them are in respect of an application by motion. However, in the light of the requirement of O 53 r 1 for leave to be first obtained before any application for an order of certiorari can be made, in my view, it is not outside the purview of the requirement of O 53 r 2 if in the application for an order of certiorari after leave has been granted, Form 10 is used even though the heading in Form 10 omitted the use of the word 'originating' because the notice is given pursuant to the leave having been granted. As to the failure to include the grounds and the affidavit verifying the facts relied on in the Form 10 notice of motion, I am of the view that it is not at all irregular because Form 10 itself does not require the inclusion of them and O 53 r 2(3) itself merely requires that the notice of motion be served on all persons directly affected and O 53 r 3(1) requires that copies of the statement and of the affidavits in support of the application for leave to apply for an order of certiorari be served with the notice of motion under r 2. In the circumstances, I see no merit at all in the complaint raised by learned counsel for the respondent. There is no irregularity in the procedure in this case.

Learned counsel for the respondent next attacked the affidavit in support of the applicant of 21 July 1995 which is in encl (2). He submitted that the said affidavit contains no verification of each and every ground found in the statutory statement prepared by the applicant's solicitor as

A the solicitor herself could not be said to have personal knowledge of the facts relied on. It was also submitted that the applicant in the said affidavit did not depose as to the source of his belief or information in respect of those grounds. He contends that there has been non-compliance with the requirement of O 53 r 1(2) of the RHC which requires an applicant to verify the facts relied on. Order 53 r 1(2) states:

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> An application for such leave must be made ex parte to the Court, except in vacation when it may be made to a Judge in Chambers, and must be supported by a statement setting out the name and description of the applicant, the relief sought and the grounds on which it is sought, and by affidavits, to be filed before the application is made, verifying the facts
C relied on.

Perusing the statutory statement in encl (1), I cannot find any shortfalls in the content of the same as required by the rule. No doubt the statement was prepared by the solicitor but by its nature it need not be prepared by the applicant himself and the necessity of the solicitor to have personal
D knowledge of the matter stated therein would not arise at all. The content involves the issue of law and not facts and it is put up for the purpose of supporting the application for the order of certiorari sought. Under O 53 r 3(1) subject to any amendment allowed, no grounds shall be relied upon or any relief sought at the hearing of the motion except the grounds and relief set out in the said statement. This rule is similar to the rule on
E pleadings by which the parties are to be bound by them. Perusing the affidavit in encl (2) by the applicant, I also cannot agree with learned counsel that it was not in compliance with the requirement of the rule. In the circumstances, the objection raised for the respondent again lacks any merit.

F Having disposed of the matters objected upon by counsel for the respondent, I will now proceed to deal with the merits of the application itself. According to the affidavit in support of the application, the applicant claimed that he was dismissed without just cause and excuse from the service of the respondent as an administrative manager stationed at Kerteh,
G Terengganu on the purported ground that he had refused the offer of the post of safety specialist in Kuala Lumpur following the purported reorganization of the respondent company wherein his post was abolished. Upon his representations made under s 20 of the Industrial Relations Act 1967, the dispute was referred by the Minister to the Industrial Court for an award. It is contended that by the award the Industrial Court had
H committed various errors in law and in fact in that it took into consideration irrelevant matters and had failed to take into account relevant matters. In particular, the Industrial Court had failed to properly consider the evidence that the purported policy of the respondent in abolishing the post was purely to rid him of the service with the respondent thereby showing mala
I fide in the respondent.

The claimant was first employed by the respondent on 2 January 1979 and at the time of his purported dismissal on 3 July 1991, he was holding the post of administrative manager drawing a salary of RM12,580 per month. For his dismissal, he was offered a retirement benefit of

RM400,000. On 18 February 1991, he was told by Edward Leon Smith, his superior, that the post of administrative manager had been eliminated due to redundancy and for better efficiency. As a result, he was to be offered the job of safety specialist in Kuala Lumpur. A formal offer for the new job was made to the applicant by a letter dated 22 March 1991 (exh 'CL4'). By a letter dated 31 March 1991 (exh 'CL5'), the applicant declined the offer for the following reasons:

> I have not attended any specialized safety courses in my entire service with EPMI to enable me to perform satisfactorily in the job. I feel it is too late for me to start gathering the specialized knowledge to fulfil the requirements of a Safety Specialist position.
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> I have held the current position of Administrative Manager for over six years now, managing various groups including Safety, Employee Relations, etc. To be transferred to a Safety Specialist position is a downgrade in my position and will (a)ffect my pride and dignity and erode my self-esteem among my colleagues.

As the offer was rejected, the respondent issued him with a termination notice dated 8 May 1991 (exh 'CL6') effective from 4 July 1991. So the issue is whether on account of the reorganization of the affairs of the respondent company, there was indeed a redundancy in the post of administrative manager held by the applicant. Secondly, whether there was mala fide in the respondent in the carrying out of the reorganization exercise resulting in the post of administrative manager being made redundant. If the answer to both issues is in the negative, there would not be any valid ground for the applicant to complain for having to lose the job as such administrative manager.

I have carefully gone through the copy of the notes of evidence recorded by the learned chairman of the Industrial Court, and also the reasons he gave in the impugned award for the dismissal of the applicant's representations against the respondent. I cannot but hold that there was no substance in the allegations made by the applicant that his dismissal by the respondent was without just cause or excuse. There was nothing in the evidence to suggest that after his dismissal the post of administrative manager had been filled by another workman of the respondent to suggest that the reorganization exercise was with a view to rid the applicant from the service of the company. The job functions previously done by the applicant were then on shared by other persons. I am also satisfied from the evidence that it is for his own reason that the applicant rejected the offer by the respondent to re-employ him as a specialist assistant after his post had been made redundant by the reorganization properly exercised in the interest of the industry carried out by the respondent. The applicant was to be paid retirement benefits on account of the redundancy but instead he considered himself to have been dismissed without just cause or excuse and chose the remedy of reinstatement instead. For the reasons given by the learned chairman, I am in full agreement that he must fail in his claim. In the present circumstances, the learned chairman was right when he said at p 9 of the impugned award:

A It must be brought to the attention of all parties that the right to reorganize the company is the prerogative of the management to achieve maximum efficiency and effectiveness and to avoid any kind of duplicity of work in the company.

This prerogative belongs to the company provided it is done bona fide. If B in the process of doing that, some workmen had to be laid off, there are ample provisions in the law to provide them with retrenchment benefits. In this case, as stated earlier, the applicant was to be paid the sum of RM400,000 for that purpose when he refused the offer by the respondent to re-deploy him in another post as a specialist assistant. This offer was properly made by the company arising out of the reorganization. The C company after all is not obliged to make any offer for any alternative employment on account of the exercise properly carried out.

In the course of his submissions, learned counsel for the applicant attempted to introduce fresh evidence by making reference to certain memorandum found at pp i–iii of his bundle of authorities in support of D the application. It must be pointed out that this court cannot entertain such new evidence which has been put forward, because it was never the evidence before the Industrial Court. Then it was submitted that the evidence put forward by the respondent before the Industrial Court was contrary to its pleading in that the reason of redundancy was not given in the statement of reply. However, the applicant in his application did not E include a copy of the pleading for my perusal. For that reason, I cannot ignore the findings of the learned chairman which is based on the evidence before him and it is not correct to conclude in the light of the submissions made that the Industrial Court based its findings on a ground different from the ground found in the pleadings as so stated in *Goon Kwee Phoy v* F *J & P Coats (M) Sdn Bhd* [1981] 2 MLJ 129 at p 104. The contention of the applicant that because the job of specialist assistant was not suitable to him and was so forced upon him with a view to eliminate him from the service of the respondent, thereby showing mala fide on the part of the respondent, I would not agree on the evidence before the learned chairman as properly covered by him in the impugned award. It cannot be mala fide G on the part of the respondent for its failure to consult or discuss with the applicant its determination to re-organize its company. In this case, it was never intended by the respondent to retrench the applicant. It considered an alternative employment for the applicant in the company without any loss of benefits he was then getting as an administrative manager. But this H golden opportunity given to the applicant was rejected by him because he felt he would be subordinate to those previously working under him. He should have accepted the offer with grace. Learned counsel referred to *Wong Chee Hong v Cathay Organisation (M) Sdn Bhd* [1988] 1 MLJ 92. But that case has no equivalent to the applicant's case. That case involved a transfer of a workman in the course of his employment and not a case of I an offer of re-employment on account of re-organization. So, for failure to accept, how is the applicant to support his contention that the respondent had failed to provide him with a reasonable alternative job? He contended that he had no experience in the new job. But as pointed out by the learned

chairman, why didn't he give the job a try? The respondent in this case, instead of providing a retrenchment benefit right away, had offered him an alternative employment. He rejected the offer. So, in what way can the respondent be said to have acted unfairly towards him? A

In the circumstances, on the evidence and for the reasons given in the impugned award, I find that the Industrial Court had not committed any error which would justify this court of review to quash the impugned award. I accordingly dismiss the application with costs to the respondent. B

Application dismissed.

Reported by S Sankey C

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